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ABSTRACT

Student affairs personnel must both ensure the safety and basic civil rights of students and also find ways to expose students to the consequences of their actions and speech. These obligations involve tensions between students' rights to free speech and their rights to equal protection under the Constitution, thus to education free from harassment. Among current policy options is the Chaplinsky "fighting words doctrine" to be used in place of vaguely-worded policies; other policies or refinements also exist. Regardless of which approach an institution chooses, several factors must be considered when developing and implementing a hate speech policy. Among these are which minority groups are to be affected, whether the policy includes faculty as well as students, whether it extends to off-campus activities, whether harm must be actual or merely potential, how the policy will be enforced, and what the range of sanctions is to be. Institutions should take a comprehensive approach to the problem, encourage on-campus dialogue, adapt the policy to particular campus circumstances. and focus methodically and concretely on First Amendment issues. Campuses should also educate students about diversity and condemn intolerance, "censuring" rather than "censoring" racist speech. Includes and 84-item selected bibliography on verbal harassment policies. (MSF)

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ED 371 246

INSIGHTS AND IMPLICATIONS OF CAMPUS HATE SPEECH CODES

PRESENTED AT THE 1993 NASPA CONFERENCE

BOSTON, MASSACHUSETTES

BY:

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Introduction

Our purpose today is to discuss some insights and implications of developing policies which restrict discriminatory speech on campus. This is a particularly difficult subject to "get a handle on." We all have strong feelings about this issue, and we hear a lot about it both in the popular press and in the professional literature. This is not intended to be a "how to" session where we tell you how best to write a hate speech policy. We don't have the "right" answers. In fact, what we've found as we've looked at this issue over the past 18 months or so, is that we get less and less sure of what we think is the answer as time goes on.

In the face of this complexity and contradiction, we believe we need to spend some time thinking about how to think about it. We're going to look at insights from two broad areas: First, we will discuss some legal and philosophical issues which should inform our discussion about this difficult topic. Second, we will narrow the discussion to some of the assumptions and beliefs we have as student affairs professionals, and how those assumptions bear upon this conversation.

We believe this kind of discussion MUST take place if we are to address this issue in any coherent form. We believe this kind of discussion is crucial to any policy which we as professionals may consider to implement on our campuses.

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Using a Developmental Framework to Look at Hate Speech

Hate speech and hate crime are much on our minds these days. We read the Chronicle, we read our local newspapers and our campus newspapers and we find example after example of our students' incivility towards eachother. We wonder why, in Rodney King's words, "we can't ail get along?"

Within our own institutions, we in student affairs seem to be the ones most often turned to to address the problem of hate speech and hate crime on campus. And, indeed there is much about this issue which fits nicely within the roles we have defined for ourselves. Delworth and Hanson (1989) suggested that student affairs professions play four roles on campus: counselor, administrator, educator, and campus ecology manager. Our positions on campus with respect to hate speech call upon us to counsel those students who have been the victims of others' hatred; to create administrative policies which support students who belong to minority groups, and which sanction behaviors which are illegal; to educate students about difference; and to view the campus as a set of relationships bewteen individuals and environments (Banning, 1989). It's as if others on campus tell us--"OK, you said you had the skills and training to made a difference in the out-of-classroom lives of students...now it's time to put your money where your mouth is, and do something about this!"

The real question here is not WHETHER we should be involved; it's HOW.

Because this issue is so heavily influenced by legal precedence and issues of protection under the First Amendment, we might be tempted to leave the entire tangled mess in the hands of institutional counsel. If we do so, however, we abdicate responsibility for an issue which we need to be heavily involved in.

Because this issue is so volatile, so consuming on some campuses, we might be tempted to see it as a discrete entity--AN issue, rather than a part of the whole of student life, impossible to separate from

everything else we do as student affairs professionals. We cannot afford to treat hate speech as a one-shot deal, a single issue which can be examined in a vacuum. This section consists of a discussion of this issue as it relates to some of the beliefs and assumptions we in student affairs hold as central to our existence. Recasting this issue in this way may assist us in better coming to grips with it.

We can look at hate speech in the context of what should be a familiar framework: the 1987 Perspective on Student Affairs developed as an update of the 1937 Student Personnel Point of View. Lyons (1990) provided a format for looking at student affairs issues through the lenses of the 1987 document.

As we know, the 1987 document embodies our values as a profession and should give us some guidance and insight into this issue. It must be remembered that the document was not developed to address this issue, therefore, the groupings are our own. Of course, there are tensions apparant as we look at this document for guidance. However, we should find ways of balancing these tensions as we consider the issue of hate speech.

Each Student is Unique

Each Person Has Worth and Dignity

These taken together send contradictory messages when it comes to developing policy on hate speech. If each person has worth and dignity, must we not affirm this worth and dignity by confronting and discouraging those who challenge any other's worth and dignity? However, if each student is unique and each student has worth and dignity, must that not also include the intolerant student or the student whose beliefs are unpopular or unaccepted?

Bigotry Cannot be Tolerated

At first glance this seems to speak clearly to the issue, and seems to be telling us that hate speech policies must be implemented. However, we need to look closer. Bigotry cannot be tolerated--by whom? And once we agree not to tolerate bigotry, what does that mean? How do we express our lack of

toleration? Who does the expressing? If we implement a policy does that signal the student affairs staff's position? What is left for students? How do we move toward getting students not to tolerate bigotry? We've been educating for a long time, and incidents of racism and intolerance still occur. Does our implementing a policy signal the fact that we've given up on education? We must not give up on education. The best case scenario is that of a campus where no policy is necessary because students themselves confront intolerance. This is not a call for vigilantism, however. Rather, it is an appeal to teach students to confront and resolve conflict with other students through mediation rather than by avoiding the issue or by relying on authority figures to solve the problem for them (Lyons, 1990).

Feelings Affect Thinking and Learning

Out-of-Class Environments Affect Learning

A Supportive and Friendly Community Life Helps Students Learn

One of the models for crafting hate speech policy is that of the "chilly climate" for minority students. One can hardly expect the student who is subjected to the scorn and hatred of others to remain unaffected by those feelings. Under these circumstances, students so affected cannot possibly be able to do their best thinking and learning. Again, the question is HOW do we work with out-of-classroom environments so that they are more supportive to all students? Who is responsible for the creation of a "supportive and friendly" community?

Student Involvement Enhances Learning

Students Are Responsible for Their Own Lives

How much of this issue is our responsibility as professionals to resolve, and how much of it is the students' responsibility? Have students been adequately included in the discussions of this issue on campus? How much imput have they had in policy development? How much responsibility should they bear for resolving differences with other students? The old proverb reminds us that if we give someone a

fish, she will eat for a day, but if we teach her to fish, she will eat for a lifetime. While a complete discussion of the legal demise of *in loco parentis* is beyond the scope of this paper, there are those who suggest that *in loco parentis* is alive and well, albeit in changed form, on our campuses today (Thomas, 1991). Are hate speech policies part of what some are calling the return to in loco parentis? Are events outside the control of the institution forcing us "back to the future?" Consider the following examples of recent "rein-tightening":

* Nearly all institutions regulate consumption of alcohol, above and beyond the regulations contained in state laws.
* More campuses are providing "substance-free" housing.
* Students appear to be more willing to pursue lawsuits against institutions for failing to protect them from the conduct of others and even their own conduct. (Although it should be noted that in each of these cases, the court found in favor of the institution.)

  Crow v. State (1990): A student sued when assaulted by an intoxicated student.

  Gehling v. St. George's University School of Medicine (1989): A student died after participating in a "fun run."

  U Texas-Arlington v. Akers (1980): A student slipped on ice and sued because classes hadn't been canceled.

  Drew v. State (1989): A student sued after being injured playing touch football during orientation.
* Almost all states have enacted anti-hazing statutes that impose an obligation on colleges and universities to monitor the pledging practices of fraternities and sororities.

* The murder of Jeanne Cleary at Lehigh University provoked increased concern about who goes in and out of residence halls.
* The 1990 Campus Crime Awareness and Campus Security Act requires institutions to report crime on campus, so that campuses can be held accountable for crimes committed on their campuses.
* Social host laws can hold institutions liable for acts committed by students who were over-served alcohol by college officials, or on college property.
* The Drug-Free Schools and Campuses Act imposes upon institutions an obligation to prohibit drug and alcohol use by students, to report to the local authorities certain conduct, and to run drug and alcohol awareness programs.

Although student affiars professionals may see their most important role as that of educators, it is becoming increasingly clear that federal, state, and local laws, as well as the increasing body of case law as a precedent, may require us to enact policies which sharply restrict the behavior of students.

The Freedom to Doubt and Question Must Be Guaranteed

Effective Citizenship Should Be Taught

What does effective citizenship consist of? What does it mean to be a citizen in a democracy? Does it mean letting someone else take responsibility for campus life? How can we empower students as citizens so that it is their responsibility for what happens on campus? Is it valid to expect students to forgo their First Amendment Rights in order to ensure the maintenance of civility on campus?

In summary we can see the inherent tensions between creating an educationally powerful environment for student learning, and creating a campus climate which nurtures and supports students who are most at risk for crime based on hatred, racism, and ignorance. We must ensure the safety and basic civil rights of all our students, however, we must find ways to expose students to the logical consequences

of their choices; choices which they, themselves, must be free to make.

Next, John will say a few words about the historical, legal, and philosophical aspects of campus hate speech codes.

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Historical and Legal Perspective

Let me first offer a definition of hate speech so we can be sure we are all talking about the same thing. William Kaplin has defined hate speech as "verbal and written words, and symbolic acts, that convey a grossly negative assessment of particular persons or groups based on their race, gender, ethnicity, religion, sexual orientation, or disability...it is not limited to face-to-face confrontations or shouts from a crowd. It may appear on t-shirts, on posters, on classroom blackboards, or on student bulletin boards."

I would also like to briefly summarize some of the more pertinent court cases relevant to the hate speech issue we are all dealing with on our respective campuses. Although these are outlined in your packets, and we encourage you to follow along as we go through the packet, we thought we would be remiss to lead a discussion on this issue without at least briefly summarizing the legal issues at stake. However, we really don't want to spend too much time discussing the legal aspects of hate speech. Rather, we would like to get into some of what we refer to as the "normative," "philosophical," and "student development" considerations. We think this kind of discussion will serve all of us better because, as we will see, the courts really have NOT settled this issue for us, despite what some journalists in the mass media might lead us to believe.

The first case we have outlined is ofcourse the grand daddy of them all.

Chaplinshy v. New Hampshire (1942)

The Chaplinsky case is the case that established the so-called "Fighting Words Doctrine." This doctrine defines fighting words as: "Those which by their very utterance inflict injury or tend to incite an immediate breach of the peace...Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly out-weighed by the social interest in order and morality." It is important to note that, since the Chaplinsky decision, the Fighting Words Doctrine has never been upheld in court. Why? I would suggest that the circumstances surrounding the Chaplinsky decision were unique. Chaplinsky was a religious fanatic who called a city marshall and the government of Rochester "fascists," during World War II. Not a good idea. It is hard to imagine any individual today being convicted for calling elected officials a bad name. Times have changed. However, it is also important to note that the Fighting Words Doctrine is still good law and does offer institutions a viable option in creating hate speech policies. But the interpretation by administrators of what constitutes fighting words had better be very narrow.

Doe v. University of Michigan (1989)

The Michigan case was the first challenge to the so-called "hate speech policies" wer'e talking about this evening. It concerns a policy at the University of Michigan which prohibited, in part, "Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion,

sex, sexual orientation, creed, national origin,....." The court declared the policy unconstitutional because the words "stigmatize" and "victimize" were considered vague and overly broad. Also, the activites of the administration in implementing the policy were considered by the court so this decision gave fair warning to administrators that their interpretation of the intent of the policy would be an important consideration in court.

Iota Xi v. George Mason University (1991)

Although the George Mason case did not deal with a hate speech policy it is significant because it further clarified the court's reluctance to regulate any expressive behavior of student's on campus. The Dean of Students had placed a fraternity house on probation for holding an "ugly Woman" contest. I might add that I don't think it helped the University's case that they had originally approved the contest as part of a week-long event but only punished the students after the event took place and many minority groups complained about the incident.

UWM Post Incorporated v. University of Wisconsin

The Wisconsin case is similar to Michigan in that the policy was overturned because it was considered unconstitutionally vague and overly broad. In addition, the court rejected the university's argument that the policy met the requirements of the Fighting Words Doctrine because it covered a substantial number of situations where the court felt no breach of peace was likely to result. Thus, the Wisconsin case showed the court's reluctance to loosely interpret the Fighting Words Doctrine.

R.A.V. v. St. Paul, Minnesota (1992)

The St. Paul, Minnesota case did not deal with a university policy but concerned a city hate crime ordinance. The Supreme Court overturned the ordinance as unconstitutional. However, although the ordinance was overturned unaminously, the court was deeply divided on their reasoning. Five justices suggested the ordinance was unconstitutional because it was a content-based ordinance, and recall that we can not restrict speech based on its content, and the remaining four overturned it because it was overly broad. Thus, I would suggest that any legal scholar wishing to make a case for or against hate speech policies could find a philosophial justification within the body of this decision. You will simply have to read it for yourself.

Well, that pretty much summarizes what most people feel are the five most important cases pertaining to this issue. If there is one overwhelming impresssion I am left with from all of this it is that the courts have really left very little ultimately decided for us. Sure, we have to be very careful in our wording and implementation of policies. Most of us all ready knew that. But is there any one case that says any effort by a university to have such policies is "illegal?" NO. So then what are we left with?

Philosphical Frameworks

Well this is where we think we have to turn away for a moment from these decisions and decide for ourselves what we should and should not do to address issues of verbal harassment on campus.

There are four scholars we think set the framework for such a discussion. Each sets up a tension that can help us to make sense of the complexities surrounding these difficult issues. First, Richard Delgado, a law professor from UCLA, turns us for the moment back to a critique of the court cases I just outlined. Delgado suggests that all these cases add up to a classic battle between the First and Fourteenth Amendments. On the one hand we all have a First Amendment right to freely express ourselves and yet, on the other hand, we also have a Fourteenth Amendment right to equal protection under the constitution, and thus, an education free from harassment. So here we have our first tension.

Another scholar, Thomas Grey, a Stanford law professor, has suggested that differences in how one looks at these issues leads one to different conclusions about how best to resolve them. For instance, Grey suggests an administrator taking a "civil rights" approach to the issue would come to a much different conclusion than one taking a "civil liberties" approach. Grey refers to a civil rights approach as one that has its roots in anti-discrimination law and social policy and is primarily concerned with the stigmatization and humiliation one feels as the result of verbal harassment. In addition, a civil rights proponent would advocate an active government to protect its citizens (or in the case of campus hate speech policies an active administration to protect its students). A civil liberties approach, on the other hand, is centrally concerned with protecting freedom of expression against censorship (a kind of "sticks and stones can break ones

bones but names will never hurt them" approach). Thus, a civil liberties proponent is exceptionally fearful of an activist government (or administration).

This dichotomous analysis outlined by Grey is similar to an argument made by Rodney Smolla (1990), a professor from William and Mary, who sets up our third tension. Smolla argues that law can be envisioned in either an Aristotlean and Hobbesian sense or from the perspective of a libertarian such as John Stuart Mill. Essentially the argument is the same. The Aristotle and Hobbesian view, analogous to the civil rights perspective, suggests the law exists to "make men good" and to do so must at times exercise censorship over opinions (recall that Thomas Hobbes was especially fearful of just about everything and felt that people had to willingly turn over their rights to a "leviathan" so as to avoid a "war of all against all"). The libertarian or John Stuart Mill view, analogous with the civil liberties perspective, argues that the law does not exist to make men good. In fact, Mill sees such a goal as outside the realm of legal authority. John Stuart Mill would allow the law to interfere only where injury was inevitable. Yet this begs the question "what counts as injury?" Does psychic injury count? How about emotional scarring? I suspect that John Stuart Mill would suggest not. Only protection from physical harm would be the proper place for government officials and administrators.

The final perspective on this issue is offered by Suzanna Sherry, a professor of Law at the University of Minnesota. She suggests that we have to distinguish between an attempt to "compel

good manners" and an attempt to "coerce good virtues". She too calls on philosophers to build her argument, this time the 18th century philosopher John Locke. In his essay titled A Letter Concerning Tolerance, John Locke wrote "it is one thing to persuade, another to command; one thing to press with arguments, and another with penalties." Thus, Sherry asks us to decide what it is we are trying to accomplish with hate speech policies. Are we trying to "coerce good virtues" through the threat of penalties or are we trying to simply "compel good manners" through persuasion and argument? As you might well imagine Sherry believes we are trying to coerce good virtues with our policies and she sees this as impossible to accomplish. Our question is "What is it we are trying to do and does it really make a difference to us as student development educators and policy makers whether we are trying to instill virtues or manners in students? In other words would our policies look any different depending on the answer to this question?

Thus, we have four perspectives:

First Amendment v. Fourteenth Amendment

Civil Liberties v. Civil Rights

John Stuart Mill v Aristotle/Hobbes

Compelling Good Manners v. Coercing Good Virtues

Scholar and Practitioner Recommendations

In addition to philosophical analysis of the hate speech issue offered by scholars, some recommendations and descriptions have been offered. This research was conducted because administrators on many campuses were determined to develop and implement policies that confront overt forms of verbal harassment. It will assist this study by providing a frame of reference to analyze how the policy formation process was conducted at this institution. In addition, it will help me better understand the various options available to administrators as they progressed, and contiue to progress, through the various phases of the policy formation process.

One researcher, Robert O'Neil, a former president of the University of Virginia, has suggested that the "fighting words" doctrine be used in place of vague policies on discrimination. This doctrine is a loophole created by the Supreme Court to leave some forms of speech (ie. face-to-face insults, lewd and obscene language which may cause an act of violence) unprotected. Specifically, the Fighting Words Doctrine states, in part:

> it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly out-weighed by the social interest in order and morality. (Chaplinsky v. New Hampshire, 1942, p. 571-2).

Many institutions have been applying this doctrine when developing their policies to ensure they do not violate the constitutional rights of students.

In addition to the fighting words approach, O'Neil has suggested that two other policy options, anti-discrimination and intentional infliction of emotional distress, have been attempted by institutions (O'Neil, 1991). Anti-Discrimination policies are codes that assimilate equal educational opportunity laws barring physical discrimination with certain narrowly described types of verbal behavior. Intentional infliction of emotional distress policies, implemented at the University of Texas for example, attempt to equate racial harassment with the tort law.

Regardless of which policy option chosen by an institution several factors must be considered when developing and implementing a hate speech policy. O'Neil (1991) has suggested six such factors, including: Scope - Which minority groups are affected by the policy (ie. race, sex, national origin, sexual orientation)?; Coverage - Similar to scope, coverage questions ask "does the policy include only students as victims and offenders or does it also include faculty as possible perpetrators and/or victims?"; Geography - Does the policy extend to off-campus activities or is it restricted to on-campus events?; Actual v. likelihood of effect - Does the victim have to suffer "actual" harm (as in the case for the tort intentional infliction of emotional distress) or does the policy require only evidence of the "likelihood" of harm?; Means of enforcement - How will the policy be enforced, what

procedures will be used, what opportunities for appeal exist, and how does any of the enforcement of the policy differ from other policies?; Sanctions - What is the range of sanctions for a violation? Is expulsion possible for one violation?

In addition to these suggestions Kaplin (1992) has recommended several criteria institutions should consider in their decision making deliberations concerning the development and implementation of hate speech policies. In brief he recommends that institutions should: foster a comprehensive approach to, and perspective on, the hate speech problem; encourage and rely upon dialogue within the campus community; consider the nonregulatory as well as regulatory options; adapt the policy to the particular circumstances of the campus; and focus on First Amendmendment issues in an exceedingly methodical and concrete way (Kaplin, 1992, p.521-4).

In addition to process considerations and policy options available to institutions, Pavela (1992) suggests some alternatives to censorship by institutions. Some of these alternatives include: stricter penalties for violations of student conduct regulations that are motivated by racism or other forms of bigotry; affirming freedom of expression while challenging and condemning racist ideas; encouraging students to learn more about cultures other than their own; and recognizing diversity within the black community (Pavela, 1992). Several scholars and practitioners have echoed these sentiments. For instance, Mary Rouse, Dean of Students at the University of Wisconsin - Madison, has suggested that campus hate speech policies represent only "two percent of the solution"

to combatting incidents of racial intolerance. She suggests the other ninety-eight percent should include education about diversity and setting and articulating values (Rouse, 1991). Similarly, Wills (1989) has suggested that campuses should "censure," rather than "censor" racist speech. In fact he suggests "the whole point of free speech is not to make ideas exempt from criticism but to expose them to it" (Wills, 1989, p.72).

ANTI-DISCRIMINATORY VERBAL HARASSMENT POLICIES

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